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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re Cassandra R., a Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

GERARDO R.,

Defendant and Appellant.

D052941

(Super. Ct. No. SJ11744)

APPEAL from an order of the Superior Court of San Diego County, Elva R.

Soper, Judge. (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Appeal dismissed.

Gerardo R. appeals from an order terminating his reunification services under Welfare and Institutions Code section 366.21, subdivision (e).<sup>1</sup> Because we conclude that the court properly ordered that Gerardo not be provided services pursuant to section 361.5, subdivision (b)(6), and that the court's order pursuant to section 366.21, subdivision (e) is therefore superfluous, we dismiss the appeal.

#### FACTUAL AND PROCEDURAL BACKGROUND

Cassandra R. is the daughter of Gerardo R. and Maria M. (together, parents).<sup>2</sup> In addition to Cassandra, Maria has four older children who have different fathers. Gerardo and Maria lived together "on and off" for five years. They separated in late December 2006, soon after the San Diego County Health and Human Services Agency (Agency) detained Cassandra and her half siblings in protective custody.

On January 4, 2007, the Agency filed a petition alleging that the children were at substantial risk of harm due to domestic violence. (§ 300, subd. (b).) During an argument in the children's presence, Maria hit Gerardo, scratched his face and lit his pants on fire. Maria had an extensive history of violence against her partners and her children. In addition to physical abuse, Maria had neglected her children, subjected them to verbal and emotional abuse, and exposed them to her sexual relations with other men.

On April 2, 2007, Gerardo and Maria submitted to the jurisdiction of the juvenile court. The court removed Cassandra from Maria's custody and ordered a plan of family

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<sup>1</sup> Unless otherwise indicated, further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Maria does not appeal.

reunification services. The court placed Cassandra with Gerardo, who was living with family friends. Cassandra's two older half sisters, Alondra M., then age nine, and Darlene M., then age eight (together, sisters), wanted to stay with Gerardo. Alondra referred to Gerardo as "Dad." Cassandra was very bonded to her sisters. The court placed the sisters in the care of the family with whom Gerardo was living.<sup>3</sup> The Agency made a referral for individual therapy for Darlene, who had disclosed that she had been sexually abused by a neighbor.

Gerardo's family maintenance case plan required that he participate in a parenting education program and a treatment program for victims of domestic violence. The Agency's plan was to reunify all five children with Maria. If Maria was unable to reunify with the children, Gerardo was willing to provide long-term care for Cassandra and her sisters.

On June 5, 2007, Gerardo went to Maria's home with Cassandra and discovered that Maria was dating another man. Gerardo began to kick the man, which frightened Cassandra. Gerardo then put Maria in his car and took Cassandra home. After Gerardo dropped off Cassandra, he drove Maria to an alley near the United States-Mexico border and began to choke her. He pulled her hair, hit her in the face, and tore off her clothes. As a result of this incident, Maria had numerous bruises on her arm, a cut on her lower lip and bruising inside her lip, and other marks. Gerardo was arrested and charged with felony spousal abuse and false imprisonment.

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<sup>3</sup> Cassandra's half brothers were each placed separately with their fathers.

The Agency detained Cassandra in protective custody and filed a supplemental petition under section 387. On June 27, 2007, the court sustained the petition, removed Cassandra from Gerardo's custody, and placed Cassandra with her paternal uncle and aunt. At the Agency's request, the court authorized the Agency to amend Gerardo's case plan to include a treatment program for perpetrators of domestic violence, individual therapy, and anger management. The court also required that Gerardo's visitation with Cassandra be supervised.

At the close of the hearing, minors' counsel advised the court that Alondra and Darlene had alleged that Gerardo had sexually molested them. The court ordered Gerardo to have no contact with Alondra and Darlene pending investigation into the allegations of sexual molestation.

In September 2007 the Agency filed a subsequent petition pursuant to section 300, subdivision (j), and section 342 (section 342 petition), alleging that Cassandra was at substantial risk of abuse or neglect as a result of Gerardo's sexual abuse of her sisters. In its detention and addendum reports, the Agency recommended that the court terminate Gerardo's reunification services, and reported that it had "delete[d] the father from the case plan."

The Agency reported that, at an interview at Children's Hospital, Darlene had provided a history of a one-time incident of sexual abuse by Gerardo that occurred at the home of her foster mother. Darlene stated that while the foster family was away, Gerardo took her and Alondra into a bedroom. Darlene and Alondra then took turns straddling

Gerardo and moving up and down on his crotch area. The girls were wearing shirts and underwear. Gerardo was wearing boxer shorts but his penis became exposed.

In response to the interviewer's questions, Alondra provided a history of multiple incidents of sexual abuse by Gerardo that had occurred both at Maria's home and at the foster mother's home. Alondra reported that, on various occasions: Gerardo told her to remove all of her clothes; she touched his penis; he touched the inside of her vagina under her clothes with his hand; he orally copulated her on one occasion; he penetrated her vagina approximately three times; he made her put her mouth on his penis once; and she kissed him on the mouth. Alondra also reported a one-time incident in which she and Darlene were naked in bed with Gerardo and they took turns having "sex" with him.

At a hearing on November 15, 2007, Gerardo denied the allegations of the section 342 petition. Over Gerardo's objections, the court proceeded to a jurisdiction and disposition hearing under section 342 as to Alondra and Darlene. Maria submitted on the Agency's reports. The court made a true finding on the petition and adopted the Agency's recommended findings and orders. The court set a contested section 342 hearing for Cassandra, to be followed by the six-month status review hearing under section 366.21, subdivision (e) (review hearing).

In the report that the Agency prepared for the review hearing, the Agency informed the court that Gerardo had been arrested on November 28, 2007, on charges of child molestation. Gerardo had completed a parenting education program and a parent support group program. He had also attended 16 sessions of a domestic violence treatment program, but did not complete the program due to his arrest. The Agency

reported that it had "delete[d]" Gerardo from the case plan, and recommended that the court terminate Gerardo's reunification services.

After several continuances, the court held hearings on the section 342 petition and the review on April 17, 2008. The court admitted in evidence the Agency's reports dated October 1 and 23, 2007 (section 342 detention and addendum reports), and January 17, 2008 (six-month status review report). The court took judicial notice of Alondra's and Darlene's case files. Gerardo did not cross-examine the social worker, offer affirmative evidence, or present argument.

The court sustained the section 342 petition and adopted the Agency's recommended findings and orders by clear and convincing evidence. The court denied reunification services to Gerardo pursuant to section 361.5, subdivision (b)(6) [sexual abuse of a sibling or half sibling]. (§§ 300, subd. (j), 342.)

At the review hearing, the court determined that Gerardo had not made substantive progress with his case plan, and that he had made no progress at all toward alleviating or mitigating the causes necessitating Cassandra's placement. Based on Maria's progress, the court found that it was likely that Cassandra would be returned to Maria's custody by the 12-month review hearing. The court found that reasonable services had been offered or provided to Gerardo and terminated his services.

On October 24, 2008, this court requested that the parties submit simultaneous letter briefs addressing whether the termination of reunification services to Gerardo at the disposition hearing, held pursuant to section 342, rendered moot the issues on appeal

concerning the findings and orders made at the review hearing, held pursuant to section 366.21, subdivision (e).

## DISCUSSION

### I

#### *The Parties' Contentions*

Gerardo contends that the court erred when it terminated his reunification services at the review hearing. (§ 366.21, subd. (e).) He argues that the juvenile court cannot terminate one parent's reunification services at the six-month review hearing if it continues reunification services to the other parent. In this regard, Gerardo asks this court to reconsider its decision in *In re Jesse W.* (2007) 157 Cal.App.4th 49, 59-60 (*Jesse W.*). Gerardo also contends that there is insufficient evidence to support the court's findings that he did not demonstrate substantive progress with his case plan and that he was provided reasonable services. He asserts that the Agency did not make a good faith effort to provide reasonable reunification services to him, and that it improperly deleted him from the court-ordered case plan when the allegations of sexual abuse were first lodged. Gerardo argues that it was in Cassandra's best interests to continue his services because Maria and Cassandra are likely to reunify and, if they do, Gerardo will have continuing contact with Cassandra.

The Agency argues that Gerardo has forfeited his arguments on appeal by failing to raise them in the trial court. On the merits, the Agency maintains that Gerardo has not met his burden on appeal to show that there is not substantial evidence in the record to support the court's findings at the six-month review hearing. The Agency further asserts

that this court should not reconsider its decision in *Jesse W.* Cassandra's appellate counsel joins with the Agency's arguments.

In supplemental briefing, Gerardo contends that the order denying him reunification services pursuant to section 361.5, subdivision (b)(6) is not determinative of the issue of whether there is substantial evidence to support a finding that he was provided reasonable services. Gerardo asserts that because the court proceeded to the review hearing after it adopted the Agency's recommended dispositional findings and orders at the section 342 hearing, the court implicitly found that it was in Cassandra's best interests to provide services to him under section 361.5, subdivision (c). Gerardo argues that the appeal has not been rendered moot, because the pertinent issue is whether the court abused its discretion when it denied him reunification services at the section 342 hearing and at the review hearing.

The Agency asserts that the order denying services to Gerardo, made at the section 342 hearing, rendered the subsequent findings and orders made at the six-month status review hearing either moot or superfluous. The Agency contends that this court should dismiss Gerardo's appeal. Minor's counsel joins the Agency's brief.

## II

*Section 366.21, Subdivision (e) Does Not Apply to a Parent Who Has Been Denied Reunification Services Under Section 361.5, Subdivision (b); the Findings and Orders Made at the Review Hearing as to Gerardo Are Thus Superfluous*

The procedures relating to disposition hearings apply to the determination of disposition on a subsequent petition filed under section 342. (Cal. Rules of Court, rule 5.565(e)(2), see rule 5.695(f)(5)(F) [denial of reunification services].) Section 361.5,



subdivision (b)(6) authorizes the court to deny reunification services to a parent when the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse to the child, a sibling, or a half sibling. While the court retains the discretion to order reunification services to an offending parent, the court shall not do so unless it finds, by clear and convincing evidence, that reunification is in the best interest of the child. (§ 361.5, subd. (c).) Once the court has determined that a provision such as section 361.5, subdivision (b)(6) applies to a parent, it is presumptively not in the child's best interest to reunify with that parent. The parent has the burden to show that reunification would in fact serve the best interests of the child. (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.)

By its express terms, section 366.21, subdivision (e), which governs the six-month status review hearing, does not apply where the court has ordered that reunification services not be provided. (§ 366.21, subd. (e), ¶ 2.) A parent who has been denied reunification services under section 361.5, subdivision (b) is not entitled to a contested status review hearing without first filing a petition for modification under section 388. (*Kimberly H. v. Superior Court* (2000) 83 Cal.App.4th 67, 71; see *In re Marilyn H.* (1993) 5 Cal.4th 295.)

We acknowledge Gerardo's contention that, in the absence of a modification of the court-ordered case plan under section 388 or section 342, the Agency was without authority to delete Gerardo from the case plan. However, after the court found that Gerardo had sexually molested Cassandra's siblings, the court properly ordered that no reunification services be provided to him, pursuant to section 361.5, subdivision (b)(6).

(Cf. *In re Alexis M.* (1997) 54 Cal.App.4th 848, 852.) Gerardo did not contest the jurisdictional and dispositional findings and orders made pursuant to section 300, subdivision (j), and section 342, which include the denial of reunification services, and did not assert that it was in Cassandra's best interest to provide reunification services to him under section 361.5, subdivision (c). Further, the court did not find that reunification was in the best interest of Cassandra. (§ 361.5, subd. (c).)

The findings and orders that the court made at the review hearing under section 366.21, subdivision (e) as to Gerardo were thus superfluous. There is no actual controversy before this court. (Cf. *Consolidated Vultee Aircraft Corp. v. United Auto., etc.* (1946) 27 Cal.2d 859, 863.)

#### DISPOSITION

The appeal is dismissed.

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AARON, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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IRION, J.